Supreme Court of the United States

OCTOBER TERM, 1879.

No. 137.

JOHN G. PHILLIPS, Administrator de bonis non of ROBERT G. SHEDD, Appellant,

vs.

ALBERT ORDWAY, Appellee.

BRIEF FOR APPELLANT.

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Solicitors for Appellant.

Thomas McGill & Co., Law Printers, Washington, D. C.

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Brief for Appellant.

STATEMENT OF THE CASE.

On the 16th of November, 1871, the defendant Ordway and the United States, by its supervising architect, A. B. Mullett, entered into the contract which will be found on pages 6 and 8 of the Additional Record. By that contract, Ordway agreed to furnish, and to dress, granite to be used in the State Department building at Washington, and the government agreed to pay him, first, a certain sum per cubic foot for the granite; second, the full cost of dressing the stone; and third, fifteen per cent. on that cost as compensation for his services in superintending the dressing of the stone. These proceedings affect only the fifteen per cent. compensation.

On the 26th of July, 1871, the complainant Shedd agreed to loan to the defendant Ordway a sum not exceeding $50,000, which the defendant agreed should be repaid with interest from the fifteen per cent. (R., 41–43, 49, 55–57.)

Shedd was a trustee, and the agreement related to his trust fund, which fact Ordway knew, as appears from the notes and bond afterwards given Shedd to secure repayment of the money. (R., 8, 9.) Between the 26th of July, when the agreement was made, and January 1, 1872, Shedd advanced from his trust fund to Ordway under that agreement the sum of $38,500, the whole of which sum, with interest from April, 1873, is still due. There is no dispute as to the amount of the indebtedness. (R., 42, 57.)

In May or June, 1872, Ordway entered into the bond which is printed on pages 9 and 10 of the Record. By that instrument, the parties simply reduced to writing the agreement made in July, 1871, and they dated it January 1, 1872, that being the time when the last of the money advanced by Shedd under the agreement was received by the Ordways. (R., 42, 57.) Shedd's proportion of the fifteen per cent. is by this bond fixed at three-eighths of the whole.

Work under the contract was begun in January, 1872, and it went on till this bill was filed, in January, 1875. In the meantime, Ordway had received on account of the fifteen per cent., by monthly installments, the sum of $173,080.38. (See his supplemental answer, Record, p. 27.) If he had complied with his agreement with Shedd, his indebtedness to the latter would have been extinguished. During the intervening two years, Shedd, by his agents, had been vigorously pressing Ordway, out of court, for a statement of his receipts and compliance with his agreement, but was met always with evasion and often with falsehood; (R., 37–40;) and to save his trust fund from utter loss, he was compelled to file this bill and ask a court of equity to decree specific performance of the bond by which that trust fund was protected.

There is no other person in court claiming any share of the fifteen per cent. There is no one entitled to come into court and dispute Shedd's title to three-eighths of it.

The firm of Andrews, Ordway & Green was formed, to carry on the work under the expected government contract, on the 7th day of August, 1871, a fortnight after the agreement between Ordway and Shedd was complete, and after a large part of Shedd's money had been advanced. (R., 42, 57.) Nothing was done by the firm under the partnership articles until about January 10, 1872. (R., 127, 161.) In the meantime the whole of Shedd's $38,500 had passed to Ordway, so that Shedd's equity was complete before the firm's began. The bond, indeed, was signed afterwards, (in May, 1872,) but it was antedated January 1, 1872, and evidenced only the equity that was at that date complete.

Moreover, by the partnership articles, Ordway alone was entitled to the entire fifteen per cent. on the south wing of the building, or State Department proper. With those articles before them, Ordway and Shedd's lawyer (Greene) prepared the bond; (R., 51;) and by the bond Ordway solemnly agreed that three-eighths of the money coming to him individually should be by him held for Shedd, "to amply, fully, and finally secure said Shedd as said trustee from any and all loss by reason of his said loan of $38,500." (R., 9.) On account of the fifteen per cent. on that south wing, there came to Ordway the sum of $152,404.51. Of this sum, $134,633 was paid to him *after the bond was signed*. (R., 146.) Not a dollar of it did he pay to Shedd, and he did without consideration pay to the firm a large part of it, to wit, the sum of $57,520.22,—more than enough to satisfy Shedd's debt. (R., 146.) So that if the firm were here with a claim on this fund, it would undoubtedly be required to make restitution of the whole sum due Shedd, before—as against him—it would have any standing in a court of equity.

But those articles of copartnership have been abrogated, and there is not now, and was not when the suit was begun, any such firm in existence. (R., 20.) When the bill was filed, a Virginia corporation, called "The Westham

Shedd was a trustee, and the agreement related to his trust fund, which fact Ordway knew, as appears from the notes and bond afterwards given Shedd to secure repayment of the money. (R., 8, 9.) Between the 26th of July, when the agreement was made, and January 1, 1872, Shedd advanced from his trust fund to Ordway under that agreement the sum of $38,500, the whole of which sum, with interest from April, 1873, is still due. There is no dispute as to the amount of the indebtedness. (R., 42, 57.)

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But those articles of copartnership have been abrogated, and there is not now, and was not when the suit was begun, any such firm in existence. (R., 20.) When the bill was filed, a Virginia corporation, called "The Westham

Granite Company," was employed by Ordway to work the quarries whence the granite came. He had before the bill was filed made a so-called assignment of the contract to that company, but the contract was by its very terms unassignable, as he and the company well knew, and his so-called assignment was expressly made subject to the approval of the government, and that approval, soon after the suit began, was refused. (R., 80.) When the bill was filed, therefore, the legal title to the contract was in the defendant. It has remained in him. The Westham Granite Company had a legal claim against Ordway for services rendered, but held from Ordway no declaration of trust and no equity of any kind. There was but one equity, and that was Shedd's.

In January, 1875, this bill was filed, praying discovery and account as to Ordway's receipts under the government contract and specific performance of the bond of January, 1872. (R., 6.) A preliminary injunction was asked restraining Ordway from collecting money on the contract pending the suit. He was at once served with process and notice of the preliminary injunction. (R., 11.) Failing to appear in response to the notice, the preliminary injunction was issued. (R., 12.) Through this and the further action of the court, Ordway at length reluctantly filed an answer setting forth his alleged receipts and expenditures under the government contract. (R., 27.) In the meantime, by consent of Shedd's counsel, the injunction was modified so as not to apply to money due for the cost of cutting the granite. And on the 7th of July, 1875, by consent of Ordway's counsel, (R., 35,) a receiver was appointed by the court to collect three-eighths of the fifteen per cent. and hold it to await the result of the cause, the other five-eighths to go to Ordway himself.

On the 24th of November, 1875, a final decree was made by the court below in Special Term, whereby it was decreed that the defendant Albert Ordway was indebted to

the complainant Robert G. Shedd in the sum of $38,500, with interest at seven per cent. per annum from the 1st day of April, 1873; and that for said sum the complainant should have execution as at law; and that the complainant was entitled to receive on account of said indebtedness the moneys then held by the receiver of the court and three-eighths of the moneys which should accrue and become due to the defendant from the United States on account of the fifteen per centum provided for by the contract of the defendant with the United States dated November 16, 1871. And the said receiver was required to pay to the complainant the money then in his hands, and a new receiver was appointed and directed to collect from the United States the whole amount of said fifteen per centum, and to pay five-eighths of the same to the defendant, and the remainder, or three-eighths, to the complainant, until said indebtedness should be extinguished; and the defendant was enjoined from collecting, or attempting to collect, from the United States the said fifteen per centum, or any part thereof. (R., 169.)

On the 13th of December, 1875, this decree was modified, by consent, so as to allow the defendant to collect from the United States five-eighths of the fifteen per centum instead of receiving that proportion of the fifteen per centum from the receiver, as provided in the decree. (R., 170, 171, 172.)

Before the case was decided in the General Term, Shedd died, and by consent John T. Goddard, his administrator, was made complainant in his place. (R., 175.)

On the 18th of December, 1876, the court in General Term made a final decree, affirming the decree of the court in Special Term, and from such decree in General Term the defendant, in open court, prayed an appeal to the Supreme Court of the United States, and it was allowed. (R. 175, 176.)

On the 22d of December, 1876, four days after the appeal to this court, the solicitor of the defendant, the appellee

here, gave notice of a motion in General Term to set aside the decree of that court and for reargument. (R., 176.) The ground of the motion, as set forth in the notice, was, that a motion for reargument, made in open court, before the above decree of affirmance, had not been determined by the court, and that the decree of affirmance should not have been made, and was irregularly and inconsiderately made. On the 30th of December, 1876, the solicitor of the appellee filed the following paper:

"Shedd *vs.* Ordway. } No. 4092.

"The appeal taken in the above-entitled cause is withdrawn, by order of defendant's counsel." (R., 176.)

On the same day a motion was made to vacate the above decree of affirmance and for leave to reargue the cause. (R., 176, 177.) Thereupon the court adjourned without day. (R., 177.)

At the next term of the court, and on the 6th of January, 1877, the court ordered that the cause be reargued. (R., 177.)

On the 19th of February, 1877, the complainant below, and appellant here, moved to vacate the order for reargument of the 6th of January, 1877, for the following reasons apparent on the face of the record:

(1) That the final decree was made at the last term of the court, and was duly enrolled, and after the adjournment of the court *sine die* it was not in its power to vacate the decree.

(2) That by the appeal and its allowance the cause was removed to this court, and hence the court below had no jurisdiction to proceed further.

(3) That by the eighty-eighth rule of the court every petition for rehearing, after a final decree has been enrolled, must contain the special matter or cause on which such

rehearing is applied for, and shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person, and that said rule was not complied with.

(4) Because the same rule provided that no rehearing should be granted after the term at which the final decree was entered and recorded, if an appeal lay to the Supreme Court of the United States. (R., 179.)

This motion was overruled by the court. (*Id.*)

The cause was then reargued on the 9th of March, 1877, and on the 28th of the same month a decree was rendered reversing the decree of the previous term, and also the decree in Special Term, and ordering the receiver to pay over the moneys and securities in his hands to the defendant. (R., 180, 181.) From this decree the complainant prayed an appeal to this court, which was allowed. (R., 181.)

The apprehended execution of the portion of the above decree relating to the funds in the hands of the receiver, after the filing of a *supersedeas* bond, led to the intervention of this court on a motion for a *supersedeas*. (See Goddard *v.* Ordway, 94 U. S., p. 672.)

The fund in the receiver's hands when the decree of March 28 was made, amounted to about $25,000. (R., 178.)

Assignment of Errors.

The court below erred—

1. In reversing a final decree after the expiration of the term at which it was rendered.

2. In reversing a final decree after an appeal to this court had been prayed and allowed, whereby the cause was pending in this court and the jurisdiction of the court below in respect of the decree was determined.

3. In assuming that the order filed in the court below on the 30th of December, 1876, could restore the cause and jurisdiction thereof to the court below.

4. In assuming that the jurisdiction of this court, when it has once attached, exists only at the volition of the party by whom it was invoked, and irrespective of this court and the rights of the adverse party or parties, and without even an order of dismissal, or other act, in this court.

5. In assuming that the legal effect of the abandonment by an appellant of the prosecution of his appeal was to work a transfer of jurisdiction from this court to the court below.

6. In assuming that the prohibition whereby a court is prevented from changing its judgments and decrees after the term, can be annulled by a mere motion made at the term, even where not entertained by the court.

7. In assuming that if the power to reverse a decree of the previous term exist, it could be exercised under a mere motion, instead of a petition, as required by the principles of chancery and the rules of the court.

8. In assuming that the final decree made at the previous term was not absolutely conclusive upon the court at the subsequent term.

9. In holding that under the bond dated January 1, 1872, Shedd was not entitled to the three-eighths of the fifteen per cent. compensation received by Ordway from the government, without regard to whether Ordway realized a profit on the whole contract.

Brief of Argument.

I.

As to the jurisdiction of the court below.

1. It was not competent for the court below to reverse the decree of the 18th of December, 1876, at the following term.

"No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistake."

Ex-parte Sibbald *v.* The United States, 12 Pet., 488.
See also Cameron *v.* McRoberts, 3 Wheat., 591.
McMicken *v.* Perin, 18 How., 511.
Noonan *v.* Bradley, 12 Wall., 129.
Roemer *v.* Simon, 91 U. S., 149.
Bank of Kentucky *v.* Wistar, 3 Pet., 431.

The eighty-eighth rule of Equity Practice prescribed by this court, in force in the court below and set out in the record, (p. 179,) provides:

"Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the party, or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court; but if no appeal lies, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court."

In the present case, no petition whatever was filed, but a mere motion was made, and the grounds of the motion were not verified as required by the rule, and the motion was not entertained or acted on, during the term, by the court. It is submitted that the rule which prohibits a court from vacating the judgments and decrees at a subsequent term, founded in public policy, is not to be nullified by the mere making of a motion not entertained or acted on by the court. Such a doctrine would indefinitely prolong the control of the court over its judgments and decrees.

Where a motion is proper, and is entertained and acted on by the court, it has the effect of suspending the operation

of the decree. (Brockett *v.* Brockett, 2 How., 238; Wylie *v.* Coxe, 14 How., 1.)

A motion not entertained and acted on falls with the term. Besides, here the rule is imperative that no rehearing shall be *granted after the term* &c.

2. The legal effect of the appeal prayed and allowed on the 18th of December, 1876, from the final decree of that date, was to transfer the cause to this court. All subsequent proceedings in the court below were without jurisdiction, and consequently null and void.

The jurisdiction of the cause cannot be, in respect of the decree, in both courts at the same time, and there must be some point of time when the jurisdiction of the inferior tribunal ceases and that of the appellate tribunal begins. That point of time is when, in appellate proceedings, a writ of error issues or an appeal is allowed.

Cohens *v.* Virginia, 6 Wheat., 410.
Generes *v.* Bonnemer, 7 Wall., 564.
Avendano *v.* Gay, 8 Wall., 376.
Slaughter-house Cases, 10 Wall., 291.
Kearney *v.* Case, 12 Wall., 275.
Suydam *v.* Williamson, 20 How., 437.
Barton *v.* Forsyth, 5 Wall., 192.

Appeals to this court from the courts below are governed by the same rules as appeals from the Circuit Courts of the United States. (Rev. Stats., sec. 705.)

And appeals from Circuit Courts are subject to the same rules as are prescribed by law in respect of writs of error. (Id., sec. 1012.)

The paper filed by the solicitor of the appellee in the court below, twelve days after the allowance of the appeal, setting forth that the appeal was withdrawn, was wholly without effect.

The jurisdiction of this court had already attached, and

the cause was here. That jurisdiction is regulated by law, and is not the property of any party to a cause. A writ of error is addressed to the inferior court, and not to any party to the cause, and orders that court to suspend further proceedings and send the record to this court. (Cohens *v.* Virginia, 6 Wheat., 410.)

And the effect of the allowance of an appeal is exactly the same. Infinite mischief and confusion would ensue from the doctrine that the jurisdiction of this court could be divested and that of the court below revested by the mere act of the party suing out a writ of error or taking an appeal. Of course a party may prosecute or not his appeal or writ of error—that is exclusively his affair; but the transfer of the cause, and consequently of jurisdiction, from this court back to the court below, is regulated by law and cannot depend upon the mere act of a party.

When the final decree was rendered the appellee had his election to appeal, or file a petition for rehearing, or, after enrollment, to file a bill of review. He chose to appeal; and having made his election, the complainant below was discharged from attendance upon the court below, and the appellee was bound by his election, and had no right to revive the controversy except in pursuance of the mode he had elected,—that is, the appeal.

It was not competent for the appellee, finding he could do better below than here, to abandon the jurisdiction which he had himself chosen. The cause being here, no step was taken in the direction of its dismissal. No application was made to this court. No order to dismiss was given to the clerk of this court, even if such order would have had any efficacy. Even if the allowance of the appeal could have been revoked by the court below, no application was ever made for the revocation of the order. On the contrary, the allowance stands to this day unrevoked.

The decree of the 28th of March, 1877, reversing the former decree in General Term, as well as the decree in Special Term, being beyond the jurisdiction of the court below, and hence null and void, how then stands this case?

This court is empowered to affirm, reverse, or modify the decree appealed from. (Rev. Stats., sec. 701.)

It is submitted that the decree appealed from must be reversed. But can this court go behind the former decree of the court in General Term, dated the 18th of December, 1876? That it cannot, is plain; for such decree is a final decree, made by a court of competent jurisdiction, and unreversed. It is therefore conclusive upon the parties and upon this court. Although appealed from, the appeal has never been prosecuted, but, on the contrary, has been abandoned in terms. The party appealing has sought another mode of redress than the process of appeal, and has voluntarily abandoned his appeal in pursuit of that other mode of redress. The records of this court show that not a single step has been taken in prosecution of the appeal. The record was not filed at the ensuing term, and the failure to file the record worked a discontinuance of the appeal. The paper filed below by the solicitor of the appellee shows an abandonment of the appeal.

The present appeal brings up for review only the record of the court below subsequent to the decree of the 18th of December, 1876, in favor of the appellant. That decree is a final and conclusive adjudication of the rights and obligations of the parties to the controversy.

Where, in the course of judicial proceedings, an opportunity to resort to an appellate tribunal is afforded by the law to correct an alleged error, and such opportunity is not availed of, and the cause proceeds, it is not competent subsequently to take advantage of the error. Under the Federal system, an appeal or writ of error lies only in case of a final decree or judgment. There may be, however, a final decree or judgment entitling a party to an appeal or

writ of error, and yet the cause may not be ended absolutely. Such is the familiar case of a decree for sale under a mortgage, from which an appeal may be taken. Under other systems, certain interlocutory orders may be appealed from. The principle, however, is believed to be universal, that where a remedy is afforded by appeal, and the appeal is not taken, a subsequent appeal carries up for review only the proceedings subsequent to the prior appealable decree or order.

See Strike *v.* McDonald, 2 H. and G., 191.
Porter *v.* Askew, 11 G. and J., 346.
Copous *v.* Kauffman, 8 Paige, 583.
Whitney *v.* Buckman, 26 Cal., 447.
State *v.* Laws, 7 Ired., 375.
Harvey *v.* Smith, 1 Dev. and Bat., 189.
Powell on Appellate Proceedings, 371, 372.

And in illustration of the same principle, see
Supervisors *v.* Kennicott, 94 U. S., 498, and cases cited.

The present case, it will be observed, is not one of successive judgments or decrees in the same cause which a court had power to make, but of a decree absolutely ending the cause, followed by a decree which the court had no power to make. The appellant has taken this appeal to get rid of such unlawful exercise of judicial power; for until reversed the last decree is binding, although beyond the jurisdiction of the court that made it. (Bank of United States *v.* Morse, 6 How., 31.)

The whole fund to be realized by the appellant is in the hands of the receiver, the officer of the court below, and is controlled by its last decree, however illegal.

The appellee having failed to prosecute his appeal from the decree of the 18th of December, 1876, and the appellant having appealed from the last decree, it is submitted,

that if the last decree was beyond the jurisdiction of the court that made it, and therefore void, nothing remains to be done but to render a decree of reversal, as this court has no more power than the court below to sit in judgment on the decree of the 18th of December, 1876.

II.

The merits.

1. As to the agreement between Shedd and Ordway.

The agreement under which Shedd advanced $38,500 to Ordway in the latter part of 1871, is established by the uncontradicted testimony of Shedd, (R., 41,) George F. Ordway, (R., 55,) and Ordway's admissions to William C. Green. (R., 49.) By the testimony of Shedd and George F. Ordway, and their memoranda made at the time, it is proved that that agreement was made on the 26th of July, 1871. (R., 45, 55, 56.) In making that agreement, George F. Ordway acted as the agent of Albert Ordway, under a power of attorney dated July 20, 1871, the making of which is not denied, and which is as broad as language can make it. (R., 45.) The testimony above referred to establishes beyond question the fundamental fact in this case: that Shedd, as a trustee, loaned to Ordway from his trust fund the sum of $38,500, upon the faith of Ordway's agreement that it should be paid back, with interest, from the fifteen per cent. commission under the government contract.

Another indisputable fact is, that the bond dated January 1, 1872, (R., 9,) was entered into by Ordway after he had received the $38,500 simply by way of reducing to writing the agreement under which he obtained the money. (R., 49.)

It is claimed, however, and the court below finally decided the case adversely to Shedd upon the theory, that this bond entitled Shedd to demand of Ordway only three-eighths of

his net profits on the entire contract. If this be so, it is manifest that the parties did not succeed in putting in writing their verbal contract, for it is proved that the main inducement which led Shedd to loan the money was the assurance that he would be paid from this fifteen per cent., which was to be clear profit. (R., 41, 49, 55.) But there was no such mistake: the bond is consistent with the contract. By the articles of copartnership between Ordway, Andrews & Green, (Ad. R., 1 to 3,) it is provided "that so much of said contract [with the government] as relates to the cutting of stone for the State Department shall inure to the benefit of Ordway alone." Thus on the face of the articles Ordway was entitled to the whole of the fifteen per cent. commission on the State Department proper, which throughout these proceedings is usually called "the south wing," and all the other proceeds of the contract went to the firm. In the bond a distinction is everywhere made between the proceeds of the contract which go to Ordway "*individually*," and those which go to him as a "partner in the firm." Of the former he is to pay three-eighths to Shedd "as they accrue to him and are payable to him from the United States Government"; while of the latter he is to pay three-eighths to Shedd "as they are divided to the said firm." Ordway's *individual* receipts must mean the fifteen per cent. commission, because that was the only thing he was to receive individually.

Furthermore the bond expressly says: "Intending hereby to include * * * any and all commissions from the government." There was but one commission, and that was the fifteen per cent.

Mr. Greene, who drew the bond, says: "He (Ordway) said Shedd was to be paid from that fifteen per cent. from time to time the money put in, and I attempted, in accordance with that understanding, to so embody it in the bond." (R., 49.)

2. As to whether Ordway has performed the agreement.

On this point, if we have construed the bond correctly, there is no dispute. Ordway admits that after the bond was signed that there was paid to him, on account of the fifteen per cent. of the south wing, a sum of money, three-eighths of which would more than extinguish Shedd's debt. This appears from his answer (R., 27) and the detailed statement. (R., 146.) This latter statement shows that six-fifteenths of the fifteen per cent. on the south wing amounted to $57,520.22, so that in all it amounted to over $143,000. It is not pretended that any part of this sum was paid to Shedd.

It was through no fault of Shedd's that Ordway thus violated his trust. Being himself in poor health, he, in February, 1874, employed Dr. John T. Goddard, his relative by marriage, to attend to the matter, authorizing him to employ counsel. (R., 43.) During the year intervening between that date and the bringing of this suit, Dr. Goddard followed Ordway closely, and endeavored to compel him to comply with his bond. Ordway promised and equivocated from time to time, and finally, after bringing Goddard from Boston to Washington to meet him and settle this business, endeavored to steal away from the appointed place of meeting without seeing him. (See Dr. Goddard's testimony, R., 37–40.) Thereupon this bill was filed.

3. As to whether Shedd is entitled to relief in equity.

By the bond of January 1, 1872, (R., 9,) Ordway covenanted that he would keep Shedd informed, "by charges, credits, vouchers, and statements in writing," of the amounts received by him under the contract. Dr. Goddard's testimony shows how he failed to carry out this part of his agreement. (R., 37–40.) And even after this suit was begun, it required the exertion of all the power of the court below to get from him a statement such as, by his bond, he had agreed to make. (R., 26, 31, 32.) Clearly,

therefore, Shedd was entitled to come into equity for a discovery and account, in respect of Ordway's receipts under the government contract. And especially was he entitled to do this since the fund he had invested was a trust fund, and was taken by Ordway with knowledge of that fact. (1 Story's Eq. Jur., sec. 533; Kerr on Receivers, 19, 26; Kerr on Injunctions, 171.) And even if he had been able, without the aid of a court of equity, to ascertain what funds were coming into Ordway's hands from time to time from the government, his remedy at law would have been seriously embarrassed, by reason of the fact that he would have had to bring a fresh action every month, and would thus have been involved in a multiplicity of suits. And judgments in those suits would have availed him nothing, because Ordway was insolvent. (See the bill of complaint, R., 5, 6, and Ordway's testimony, R., 134.) In such a case, a court of equity will give relief by appointing a receiver to collect the fund and perform the trust.

Buck *v.* Swazey, 35 Me., 42.
Furman *v.* Clark, 3 Stockton, (N. J.,) 310.
Buckston *v.* Leiter, 3 Atk., 383.
Cheek *v.* Tilley, 31 Ind., 122.
And see Covington Drawbridge Co. *v.* Shepherd, 21 How., 112.

A court of equity having jurisdiction on the above grounds, or any of them, will go on to give complete relief.

Hepburn & Dundas *v.* Dunlop, 1 Wheat., 179.
Russell *v.* Clark, 7 Cranch, 69.
Clark *v.* White, 12 Pet., 178.

4. As to the alleged defect of parties.

The facts relating to the alleged interest of the firm of Andrews, Ordway & Green and the Westham Granite Company in the fund in the court below, are succinctly set

forth in our "statement of the case" in this brief. As neither the firm nor the company is a party to this suit, the rights of neither can be adjudicated here, and the question is simply whether the bill must fall to the ground because of the absence of *necessary* parties.

We maintain that the firm of Andrews, Ordway & Green is not a necessary party to this suit, for these reasons:

First. The original agreement relied upon by Shedd antedates the articles of copartnership, and Shedd's money was all received by Ordway, and his equity was made complete, before the firm had spent any money on the work, and therefore before they had acquired any equity in the proceeds of the contract. (R., 41, 42, 57.)

Second. Because of the fifteen per cent. paid by the government on the south wing of the building, none of which belonged to Andrews, Ordway & Green, and three-eighths of which did belong to Shedd, over $57,000 was paid by Ordway without consideration; (R., 122;) so that whatever interest that firm may have in the fifteen per cent. must in equity be subordinated to Shedd's claim, which is far less than $50,000.

Third. Because the firm was dissolved before this suit was brought, and it had ceased to have even the appearance of an interest in the contract. (R., 20, 80.)

The Westham Granite Company is not a necessary party to the suit, because it claims an interest in the contract only under an attempted assignment to it by Ordway, which assignment failed in consequence of the government refusing to approve it. (R., 80, 81.) The failure of the assignment left the company without any agreement at all with Ordway. It is that company, and that company alone, which was concerned with Ordway

in carrying out the contract when this bill was filed, and their position, as shown by the testimony of their auditor, Mr. Pickering, just cited, is no better, so far as standing in a court of equity is concerned, than that of any laborer employed on the work expecting to be paid from the proceeds of the contract, but without any right to claim payment from any particular fund.

We therefore submit that the appellant, without regard to the merits of his case, is entitled to a reversal of the decree below of March 28, 1877, and to a mandate requiring the court below to enforce its decree of November 24, 1875, in Special Term, and that, if the case were here upon the merits, he would be entitled to a decree in substantial conformity with the decree of 24th of November, 1875.

W. D. DAVIDGE,
A. S. WORTHINGTON,
Solicitors for Appellant.

Supreme Court of the United States.

No. 137.

JOHN T. GODDARD, ADMINISTRATOR OF ROBERT G. SHEDD, APPELLANT,

vs.

ALBERT ORDWAY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for the Appellee.

R. T. MERRICK,
M. F. MORRIS,
For Appellee.

Judd & Detweiler, Printers, Washington, D. C.

Supreme Court of the United States.

No. 137.

JOHN T. GODDARD, Administrator of ROBERT G. SHEDD, *Appellant*,

vs.

ALBERT ORDWAY.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

This suit is intended to enforce an alleged assignment of an interest in a contract entered into by the appellee with the United States. The appellee relies on the invalidity of such assignments, under the express provisions of the law, and the repeated decisions of this Court.

Act of February 26, 1853, 10 Statutes, p. 170.
Act of July 17, 1862, 12 Statutes, p. 596, Sec. 14.
Revised Statutes, Sec. 3477, 3737.
U. S. *vs.* Gillis, 95 U. S., p. 407.
Kirk *vs.* Spofford, 97 U. S., p. 484.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Appellee.

Supreme Court of the United States.

No. 137.

JOHN T. GODDARD, ADMINISTRATOR OF ROBERT G. SHEDD, APPELLANT,

vs.

ALBERT ORDWAY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

Statement of Case.

In August, 1871, the appellee, Albert Ordway, obtained a contract to furnish to the United States sufficient granite for the construction of the new building for the State Department. The contract was formally executed, and bears date on the 16th of November, A. D. 1871, (Record, pp. 8, 9,) and subsequently, to wit, July 20th, 1874, extended to embrace the new War and Navy Department buildings. (Addition to Record, pp. 6, 7, 8 and 9.)

Ordway had previously owned or controlled a quarry below Richmond, Va., known as the James River Quarry, from which he proposed to furnish the stone. (Record, pp. 124 and 125.) Mullett, supervising architect of the Treas-

ury, notified him about the 1st of August, 1871, that the contract would be awarded to him, provided he could get control of the Westham Granite Quarry, above Richmond, which seemed ample to the supervising architect to supply the stone required, while the James River Quarry appeared insufficiently developed for that purpose. Messrs. Andrews and Green owned the Westham Quarry; and Ordway was therefore compelled to get control of the Westham Quarry in order to secure his contract. This he accomplished by entering into partnership with Andrews & Green, on August 7, 1871, for the purpose of supplying the stone required under the contract with the Government. Ordway contributed the contract, and Andrews and Green conveyed to him conditionally one-third interest in the quarry. Each partner was to pay into the firm $8,333.33; and they were to share the profits in the proportion of $\frac{14}{36}$ to Ordway, $\frac{11}{36}$ to Andrews, and $\frac{11}{36}$ to Green. A portion of the work specified in the contract with the Government, namely, the cutting of the granite for the portion of the building designated as the State Department, was not to go into the firm; but remained nominally, according to the copartnership articles, the right of Ordway alone, having already been assigned by him to one Andrew Washburn. (Addition to Record, p. 3; Record, p. 122.) Ordway never paid the $8,333.33, nor any part thereof, nor did the copartnership ever receive any profits. (Record, 159.)

Ordway, having borrowed money from the original complainant in this case, Robert G. Shedd, which he seems to have used in part to develop the James River Quarry, but none of which ever went into the copartnership or was used in executing the Government contract, (Record, 162, 125,) executed in June, 1872, an agreement with Shedd, dated back as of January 1, 1872, in which he acknowledges an indebtedness to Shedd of $38,500, and conveys to him three-eighths of the profits that were to accrue to him (Ordway) from the contract with the Government, or as a partner in

the firm of Andrews, Ordway & Green; and such profits were to be paid over to Shedd, *according as divisions of profits were made between the members of the firm of Andrews, Ordway & Green.* (Record, p. 10.)

The agreement between Ordway and Shedd, by a subsequent covenant, extended to all other sources of income that Ordway might receive; but, as only the profits of the Government contract are involved in the present case, it seems unnecessary to burden the record with other matters.

Shedd claimed that Ordway had concluded his contract with the Government for the State Department building; that he had made large profits out of it; and that he had failed to account for them according to his agreement. And, therefore, he filed the bill in the present case, asking for an account, an injunction, and a receiver.

Ordway answered, denying that any profits had been realized from the contract for the State Department building; but that the contract had now been extended for the War and Navy Departments, and that it was expected that large profits would be realized from them. He stated, also, in his answer, that the firm of Andrews, Ordway & Green, became embarrassed in 1873, and was merged in an incorporated company, known as the Westham Granite Company, composed of the members of said firm, one J. Condit Smith, and one John Pickering. (Record, pp. 20, 22.)

After various preliminary proceedings not necessary to be specified here, testimony was taken at Boston, Richmond, and Washington. The testimony at Boston and Richmond was taken orally, instead of by way of interrogatories, contrary to the protest of counsel for defendant.

A receiver was appointed, who collected some money from the Government, and the special term of the court rendered a decree enjoining the defendant, his attorneys and assigns, from collecting the 15 per centum specified in the contract with the Government, and directing the receiver to collect

the same and pay over to the complainant the amount already in his hands, and to pay over three-eighths of the amount that should thereafter be collected to the complainant.

On appeal to the general term the decree of the special term was first affirmed, and afterwards on reargument was reversed. From the decree of reversal the complainant appeals.

Before any action was taken in the general term the complainant Shedd died, and John T. Goddard was appointed his administrator in the State of Massachusetts. As such administrator he was substituted as a party to the suit, and after such substitution the decree of the special term was affirmed in his favor.

I.

It is settled by repeated adjudications of this Court that an executor or administrator cannot sue out of the jurisdiction from which he has derived his authority.

Vaughan *vs.* Northrup, 15 Peters, 1.
Fenwick *vs.* Sears, 1 Cranch, 259.
Dixon's Exrs. *vs.* Ramsay's Exr., 3 Cranch, 319.
Kerr *vs.* Moon, 9 Wheaton, 565.
Aspden *vs.* Nixon, 4 Howard, 467.
Noonan *vs.* Bradley, 9 Wallace, 394.
Noonan *vs.* Bradley, 12 Wallace, 121.

By the act of Congress of June 24, 1812, (2 Statutes at Large, 758, sec. 11,) foreign executors and administrators were authorized to maintain suits in the District of Columbia; but this provision was abolished in the Revision of the Statutes of the United States for the District of Columbia, which went into effect on June 22, 1874.

The Revision (sec. 1296) repeals all acts of Congress passed prior to December 1, 1873, any portion of which is embraced in the Revision. Sections 6, 7, and 15 of the act of June 24, 1812, are embraced in sections 829, 830, and 1019 respect-

ively of the Revision: and section 11, which gave the right of suit to foreign executors and administrators, together with the other section of the act, has been omitted. It is therefore repealed.

But it may be argued that the apparent consent given, or supposed to have been given, by counsel for defendant to the substitution of a foreign administrator as a complainant in the suit estops him from now objecting to the character of the complainant.

The consent apparently supposed to have been given, was in fact never given. Counsel for defendant declined to consent, and declined to sign the words "consent" appended to the order, as will appear from the Record, page 175.

But supposing that the defendant did actually consent, as stated in the printed order, the consent does not waive the objection now taken. The consent simply admits the representative character of the party *as stated;* that is, that he was administrator in the State of Massachusetts; it does not admit that he was an administrator in the District of Columbia; and it would be only as an administrator in the District of Columbia that he would be entitled to sue.

Noonan *vs.* Bradley, 9 Wallace, 403.

There is no question of pleading here, no question as to whether a plea in abatement or a plea to the merits is the proper mode to raise an objection to a suit in the name of a foreign executor or administrator, on which some of the cases on this subject turn, as mentioned in the case last cited. At the point to which the present case had reached, there was no opportunity for pleading of any kind. Either the one side or the other had a right to make any person a party to the litigation it might think proper, unless objected to, and submitted to the court, and if a party was made without objection or by consent, the question as to whether he was a proper party or not, would come up on the hearing.

A foreign executor or administrator may be made a party

to a suit in this court for the purpose of the appeal, because the jurisdiction of this court is co-extensive with the Union, and because there is a rule of this court to that effect. But no such substitution can be made while the case is pending in a lower court.

Neither does it make any difference that the money sought to be reached is money in the hands of the United Staes Government. It has been decided by this court (Vaughan *vs.* Northrup, 15 Peters, 1,) that funds of a decedent in the hands of the United States Government are assets in the hands of an executor or administrator anywhere throughout the Union. But this is not that case. It is not the case of an executor or administrator seeking to recover funds of a decedent from the Government. It is the case of a foreign administrator coming into the courts of the District of Columbia to compel a party found in said District to account for funds received, or to be received by him from the Government, and to obtain a judgment against the defendant on certain money obligations.

II.

The Order of Rehearing.

After the substitution of John T. Goddard, administrator of Shedd in Massachusetts, as complainant in the case, and the rendition of the first decree of the general term in his favor, *and at the same term of the court*, a motion for a rehearing was filed on behalf of the defendant. (Record, pp. 176, 177.) This motion was brought up on the 30th of December, 1876, the last day of the then existing term, and was continued to the next ensuing term, which began on the second day afterwards, Monday, January 1, 1877. At this term a reargument was ordered, (Record, p. 177,) and a decree rendered rescinding the previous decree, reversing the decree of the special term, and dismissing the bill; and it is from this decree that the present appeal is taken.

It is objected that it was not within the province of the court below to grant such rehearing and reverse its former decree. A similar objection was made in the court below and overruled, (Record, p. 179;) and as the objection is renewed here, and upon the same grounds, it becomes necessary to examine the sufficiency of those grounds.

1st. It is suggested that it was out of the power of the court to vacate its final decree after the adjournment of the term.

The adjournment of a term does not take away the power of the court over its decrees, if proceedings have been instituted during the term to vacate such decrees.

Brockett *vs.* Brockett, 2 Howard, 240.
Wylie *vs.* Cox, 14 Howard, 2, 3.
Evans' Practice, 339.
Act of Maryland, 1787, chap. 9, sec. 6.
Noonan *vs.* Bradley, 12 Wallace, 129.
Edwards *vs.* Elliott, 21 Wallace, 532.
Dorsey *vs.* Clark, 4 Harris & Johnson, 553.

All that is required of the party moving for a rehearing is, that the application should he made at the *same* term at which the decree has been rendered. (Noonan *vs.* Bradley, 12 Wallace, 129.) The further action of the Court upon his application is beyond his control, and may be continued from term to term, in the discretion of the Court.

2d. In the second place it is objected that the court had no jurisdiction to rehear the cause, because an appeal had been taken by the defendant from the first decree, and the appeal had been allowed; and the cause was therefore pending in this Court when the court below, on the 6th of January, 1876, allowed the rehearing.

But to this objection there is a complete answer, viz, that the defendant had withdrawn his appeal, (Record, p. 176,) which he was entitled to do, in the mode and at the time in which he did it;

Ward *vs.* Hollins, 14 Maryland, 158.

3d. Objection is made, in the same connection, that the motion for a rehearing was not in accordance with the 88th rule of the Court, and did not comply with its requirements.

It does not appear where there was any substantial departure from the requirements of the rule. But in any event, it was within the province of the Court to relax the provisions of the rule, if they deemed proper; and the allowance or refusal of a rehearing being always within the discretion of the court to which the application is made, is not a proper subject of review on appeal.

Wylie *vs.* Cox, 14 Howard, 1.
Cheang-Kee *vs.* United States, 3 Wall., 326.
Buffington *vs.* Harvey, 95 U. S., 100.
Sterns *vs.* Franklin County, 14 Wall., 15.

4th. But the final and conclusive answer is, that by the statute of Maryland, in regard to such cases, it is provided that the Court may vacate its judgments or decrees "for fraud, deceit, surprise or irregularity in obtaining the same."

2 Kilty's Statutes, Nov. Session, 1877, chap. 9, sec. 6.

Under this act the Court may, under the circumstances specified, vacate its judgments or decrees *at any time*.

Munnikuysen *vs.* Dorsett, 2 Harris & Gill, 378.

The matter is exclusively in the discretion of the court below, and therefore not subject to review in this Court. The ground upon which the rehearing was granted, was as set out in the motion—"irregularity" in obtaining the decree. (Record, p. 176.)

5th. Even if it be true, as argued by the appellants in their brief, that after the allowance of the defendant's appeal on December 18, 1876, no further action could be had in the court below, and the whole case was then transferred to this

court, then that appeal is yet pending here. It has never been dismissed or withdrawn here. Its attempted withdrawal in the court below was, upon that theory, utterly ineffectual, null, and void. Therefore, upon the filing of the record here by the present appellants, within the time limited, such filing inured to the benefit of the former appeal as well as to that of the present one. For the reason, that under the law in case of cross-appeals, it is sufficient to file one transcript, and both appeals can be heard on the one transcript.

Act of August 6, 1861, 12 Stats., p. 319.
U. S. Revised Statutes, sec. 1013.

The appeal being here, and the record being here, this court will look into the whole record; and even if it is found that the court below was in error in rehearing the case and reversing its prior decree, its final decision will not be interfered with, if it appears from the whole record that such decision was right, and that the complainant was not entitled to recover in the first instance.

When the whole record is before the Court it is the duty of the Court to give judgment on it, and not merely on the points made by counsel.

Garland *vs.* Davis, 4 Howard, 143.
Slacum *vs.* Pomery, 6 Cranch, 221.

Whenever a complainant on his own showing has no right to recover, although errors have been committed against him, a judgment against him should be affirmed. "Opposite rulings could not have helped him. His case is inherently defective. The defect is incurable and fatal."

Barth *vs.* Clise, 12 Wallace, 403.
Slacum *vs.* Pomery, 6 Cranch, 221.
Stockton *vs.* Bishop, 4 Howard, 168.

"To warrant the reversal of a judgment, there must be not only error found in the record, but the error must be

such as may have worked injury to the party complaining. The bill of exceptions contains all the exceptions in the case; and though the jury may have found their verdict on a wrong theory of the case, *yet as the Court can see that the verdict was correct*, the plaintiff in error is not harmed by the misdirection of the judge. The result is right, although the manner of reaching it may have been wrong." Such is the language of this Court in—

Decatur Bank *vs.* St. Louis Bank, 21 Wallace, 301.
Brobst *vs.* Brock, 10 Wallace, 528.

Evidently, therefore, whether the defendant's appeal is pending here or not, this Court will examine the whole record to ascertain the correctness of the final decree of the court below; and if it finds that such a decree was a proper one to be rendered on the merits of the case, it will not disturb it on account of alleged irregularities in the proceedings.

III.

The Merits.

The appellant, whilst compelled to rest his case upon the written contract, or bond, executed in June, 1872, but dated January 1, 1872, (Record, p. 4,) at the same time claims some undefined and indefinable equity as having arisen in July, 1871. (Compt's Brief, pp. 2 and 3.)

In this aspect of the case a brief history of the transaction as developed by the evidence becomes necessary.

(*a.*) Albert Ordway, the defendant in this case, was, in the spring of 1871, the principal owner of a property on the James river, below the city of Richmond, upon which he was developing a quarry for granite, known as The James River Granite Quarry. He was also engaged in business in the city of Richmond, under the firm name of Albert Ordway & Co., selling roofing slate, cement, &c., upon commission.

In June, 1871, the United States advertised for proposals for furnishing granite to build the new State Department building in Washington.

Albert Ordway made a bid to furnish the granite from his James River Quarry, and submitted a sample of the stone.

The bids were opened, and held under consideration. In July, George F. Ordway, a cousin of the defendant, visited him at Richmond.

The defendant exhibited to him the quarry which he was endeavoring to develop, informed him of his efforts to obtain a contract from the Government, showed him the extent of his other business, and his want of capital to carry out the various enterprises in which he was engaged, and convinced him that if he could obtain capital he was in a fair position to make money.

George F. Ordway told defendant of his intimate relations with the complainant, Shedd, and that Shedd had control of a large amount of money, from which he could obtain what was desired, if Shedd could be satisfied of the safety of the investment. Defendant thereupon suggested to George F. Ordway to unite with him as a partner in his various enterprises, and to obtain money from Shedd on the strength of his individual credit with him, and that he, the defendant, would also unite in or endorse notes to Shedd; that he could also use the credit of the Ordway Slate Company, of which defendant and George F. Ordway were one-half owners; that he could also represent to Shedd that defendant felt sure of obtaining the contract from the Government, which would probably result in large profits, which would satisfy Shedd of his ability to repay the loan; *and that further security could be given Shedd by incorporating the business of the James River Quarry, and giving him its stock as collateral.*

George F. Ordway acceded to the propositions, with the understanding that if he should be able to raise the money he would put it in the hands of the defendant as a special

partner, so that it should not be connected with or affected by his own business in Boston.

Defendant thereupon gave George F. Ordway a full and complete power of attorney to make any kind of agreement for and on his behalf.

George F. Ordway returned to Boston, and obtained money from Shedd, and for this money agreed to give Shedd notes at five years, bearing six per centum interest, to be executed and signed by himself, by his wife, J. M. Ordway, by his own firm in Boston, Ordway & Co., by Albert Ordway & Co., the firm in Richmond, in which he was to become a special partner by virtue of the money thus obtained; and by the Ordway Slate Company; and that he would also give him further security by a lien upon the James River Quarry property. (Record, pp. 41, 42, 58, 65.)

He thereupon communicated to defendant his success in the matter, and transferred to him money on account of it at various times. (Record, p. 57.)

Defendant immediately organized his enterprise in the James River Quarry as an incorporated company, and on the part of Albert Ordway & Co., took a portion of the money which he had received from George F. Ordway as his addition to the capital of the firm, and invested it in the new corporation, and had $83,000 of the capital stock transferred and sent to George F. Ordway to hand to Shedd as collateral security for his loan as had been agreed upon, (pp. 64, 65.) About the end of September the last amount of money that George F. Ordway had agreed to invest with the defendant was sent to him, and at the same time the six notes first set out in the memorandum of notes at pages 7 and 8 of the Record for the defendant to sign on the part of Albert Ordway & Co., and as agent of the Ordway Slate Company. The execution of these notes and the transfer of the $83,000 of stock of the James River Granite Company *completed this transaction.* Albert Ordway was in Richmond from about July 11th to July 21st, 1871, engaged in

these negotiations with defendant. (Albert Ordway's evidence, Record pp. 55, 56.)

About the first of August the Supervising Architect of the Government, A. B. Mullett, notified defendant that the bid which he had made to furnish granite to build the new State Department building would be awarded to him provided he could obtain control of the Westham Granite Quarry, a quarry situated on the James river, some six or seven miles above Richmond, (Record, p. 59.) This notification was in consequence of an examination made by Mr. Mullett of the James River Quarry, (Record p. 124,) upon which defendant had bid and from which he had furnished a sample of stone, and his decision that the said quarry was not sufficiently developed to have the capacity to fill the contract. It will be observed here that this determination by Mullett that he would not accept the James River Quarry to furnish the contract was about the first of August, 1871, and that the first transfer of money to the defendant by George F. Ordway, by virtue of the authority given him by Shedd on the 26th of July, was on the 12th August, 1871.

The Westham Quarry was owned by R. Snowden Andrews and Samuel S. Green, and immediately on the notification from the Government, defendant entered into negotiations with them, (Record p. 59,) the consequence of which was the forming of a copartnership on the 7th August, 1871, for the purpose of carrying out the contract with the Government, if obtained by the defendant.

When the contract between the defendant and the Government came finally to be signed and executed, November 16, 1871, upon the request of the defendant, it was drawn to express that the stone should be furnished from the James River Quarry *or* from the Westham Quarry at the option of the Government. The option had already been taken and decided by the Government upon the Westham Quarry, (Record p. 124,) but the defendant desired the James River Quarry to be named in order that it might

give the stone from that quarry a reputation, and the stamp of approval of the Government, so that if the quarry developed a capacity, that its value would be enhanced, and that he might be enabled to obtain contracts for private work on the part of the James River Granite Company, that could not be taken by the other firm which he had created for the purpose of fulfilling his contract with the Government from the Westham Granite Quarry.

The defendant after making his bid to furnish granite to the Government had entered into certain agreements with one Andrew Washburn, in August, 1871, to associate him as a partner in event of success, (Record pp. 91, 154, 155, 122,) which agreement was carried out by articles of copartnership entered into between the defendant and Washburn, November 25, 1871, the date the contract between himself and the Government was executed, which agreement was filed with the Secretary of State, approved by him, and recognized by the Government, (Addition to Record pp. 3, 4.) Under this agreement Washburn was to cut and dress all of the stone for the south wing of the building. The agreement to enter into this co-partnership was stated by the defendant to Andrews and Green, when he proposed his copartnership to them, and as a consequence it was provided in their co-partnership that all of the proceeds of cutting the stone for the south wing should go to Ordway, while for the balance of the building they should inure to the firm. *This was to enable Ordway to carry out his prior agreements with Washburn.* (Record pp. 160, 161.)

It will be perceived that all these events were occurring *pari passu* with the negotiations of George F. Ordway with the complainant; that the fact that the Government would not accept the James River quarry in which George F. Ordway proposed to invest the money he obtained from Shedd, was known to him before one dollar of money had been passed by him to the defendant (Record, pp. 58, 59) and the copartnership of the defendant with Andrews and Green was

entered into by defendant before he had received any money through George F. Ordway that belonged to complainant.

In fact, it was well understood between defendant and George F. Ordway that although the James River quarry had failed to obtain the contract, that it would probably nevertheless prove a valuable speculation by being able to obtain outside contracts, and that even if it did not, the outside business of defendant and the profits he would derive in his co-partnership with Andrews and Green, were sufficiently promising to justify the loan from complainant.

In January, 1872, George F. Ordway went into bankruptcy. As soon as the defendant heard of it, knowing that the money George F. Ordway, as a special partner, had put in his hands, was money obtained from complainant, and that on the notes given he was personally and jointly bound with others for its repayment, he wrote to the complainant that to save him from the effect of George F. Ordway's bankruptcy he proposed to obliterate George F. Ordway's interest as a special partner with him, and assume all of the liability. (Record, p. 3.) This the defendant assumed to do without the consent of George F. Ordway, for the reason that George F. Ordway was under medical treatment, and reported as partially insane.

This was the first communication, written or verbal, that ever passed between defendant and complainant in relation to this matter. Complainant admits in his bill (page 3) that defendant wrote to him to know condition of accounts, and what indebtedness really existed. He admits that defendant acknowledged promptly receipt of statement of the indebtedness, and forwarded to him an individual note for $5,231.40, balance on a note of George F. Ordway's to him for $10,000, on which the bankrupt estate of George F. Ordway had paid him $4,768.58.

It should be borne in mind at this point that this personal assumption of liability by the defendant for complainant's loan was made by letter, February 15, 1872, months after

he obtained his contract with the Government, and entered into his co-partnership with Andrews and Green, his co-partnership with Washburn, and every agreement and arrangement he had made in relation to his contract.

In the spring of 1872, sometime subsequent to the defendant's letter to complainant of February 15, 1872, and after he had received from complainant a statement of the transactions between him and George F. Ordway, complainant sent one Wm. C. Green, an attorney, to Richmond, for the purpose of making some arrangement with the defendant to secure the execution of the obligation he had assumed, and to see defendant "*as to investment complainant had made in the development of the James River Quarry.*" (Green's deposition, Record, p. 46.)

His negotiations with defendant resulted in the execution of the agreement upon which this suit is brought. (Record, pp. 9, 10, 11.)

By this agreement, actually executed in June, 1872, but ante-dated January 1, 1872, it was, among other things, covenanted and agreed that Shedd should, in consideration of the security thereby given, *surrender up the five hundred shares of James River Granite Company stock which he had originally taken as security for the advances made.* (Record, pp. 4, 10, 47, 51, 151, 152, 153.)

It thus appears that two distinct and different arrangements were made at two distinct and different times between the complainant and defendant.

The first was made when the defendant supposed he would be able to secure the Government contract and furnish the granite, himself, from the James River Quarry, which he owned, and when the endorsers upon the notes given for the advance made by the complainant were perfectly solvent; the second, after it had been ascertained that the granite was to be furnished from a different quarry, which defendant did not own, and was therefore compelled

to purchase, and after the James River Quarry had proved comparatively valueless, (Record, p. 53,) and after George F. Ordway, one of the sureties, had become insolvent.

(*b.*) What rights did the complainant acquire under the agreement, dated January 1, 1872?

The language of the instrument is specific as to the particular ~~ground~~ fund upon which complainant was to ~~base~~ have a lien, or which was thereby intended to be assigned to him, and also as to the particular time when the fund so assigned should be paid over:

> "And the said Ordway hereby conveys to the said "Shedd three-eights (⅜ths) of the entire *profit* that "shall *accrue* to him, the said Ordway, in carrying "out and filling said contract with the United States "Government, * * * hereby intending to transfer "as a lien * * * three-eights (⅜) of the *profits* that "may *accrue* to the said Ordway, either individu- "ally or as a partner in the firm of 'Andrews, Ord- "way & Green.' Intending hereby from the *income* "and *profits* of said Government contract * * * "to secure said Shedd," &c., &c.
>
> Record, p. 9.

The instrument contains a covenant that Shedd shall be informed of the amount received by Ordway "*as his share of the profits.*"

As to the times of payment, the instrument provides as follows:

> "And that he will make any and all of said pay- "ments as they accrue to him and are payable to "him from the United States Government, and at "such times as they are divided, to the said firm of "Andrews, Ordway & Green."

It is, therefore, apparent that it was the *profits* of Ordway only that he granted to Shedd, and that they were payable

only when profits were ascertained and divided among the members of the firm of Andrews, Ordway & Green.

That the agreement was so understood by W. C. Green, Shedd's counsel, by whom it was made, is apparent from his letter of September 4, 1872, addressed to the defendant. (Record, pp. 53, 54.)

(*c*) The complainant has not only failed to show that profit had been realized, but, on the contrary, conclusively established the fact that none had been made or received by the defendant or his firm from the contract in question, or any other source.

Answer of Defendant, Record, p. 13.
Evidence of Defendant, Record, pp, 133, 134.
Evidence of Col. Andrews, Record, pp. 159, 160.

By the terms of the co-partnership between Andrews, Ordway, and Green, each partner was to pay into the firm as cash capital the sum of $8,333.33. (Addition to record, p. 1, folio 3.) This sum Ordway never paid. (Record, p. 162, folio 569.)

By said articles of co-partnership the Westham quarry, owned by Andrews and Green, was estimated at $60,000, (addition to Record, p. 2, folio 3,) and in consideration of the transfer of one-third interest therein to Ordway, they were to realize $20,000 as their profits of the enterprise, or the defendant Ordway was to pay them $20,000, when his one-third interest would become absolute. (Addition to Record, p. 2, folio 3.)

Andrews and Green realized no profits whatever, and Ordway has never paid them anything in money. (Record, p. 159, folio 560.)

The firm of Andrews, Ordway & Green became very much embarrassed, and were borrowing money. (Record, pp. 161, 162, testimony of Col. Andrews.)

They borrowed also from Colonel Smith $60,000, and to secure the debt of the firm, Ordway gave him an order on the disbursing agent of the State Department to draw the money coming to him on the contract. (Record, pp. 110, 111, folio 390.)

The company was then merged in a corporation called The Westham Granite Co., (Record, p. 93,) and the partnership took stock of the company in consideration of the property of the firm and the Government contract, all of which was, as far as could be, transferred to the corporation. (Record, pp. 93, 130.)

A full account of this transaction is given on pp. 130 and 156, Record.

The amount of stock given to the firm was 1,470 shares, of the par value of $100 per share. (Record, p. 156.)

These shares constitute the partnership assets, and are subject to the partnership debts. (Record, pp. 121, 156.)

At the time of the organization of the Westham Granite Company, the firm of Andrews, Ordway & Green were largely indebted, owing, probably, for money expended on the improvement and development of the quarry, not less than $150,000. (Record, p. 78.)

The defendant has hypothecated certain of his shares for various purposes, (Record, p. 120,) and what amount he will be entitled to receive cannot be ascertained until a decision is obtained from General Bradley T. Johnson, to whom all questions between the defendant and his co-partners, Andrews & Green, have been referred. (Record, p. 95.)

(*d.*) Complainant contends, however, that the money advanced by him to the defendant was used to develop the Westham quarry, and in aid of the enterprise of Andrews,

Ordway & Green, and that, *therefore*, he should be entitled to receive anything that may be payable on the Government contract to the defendant, *or to anybody else*. The logic is difficult to appreciate, but is particularly defective in not being founded on the facts of the case.

The money advanced by complainant was never used in developing the Westham quarry, nor in any way in executing the contract in question. (Record, pp. 162, 125.)

The stone used in executing the contract came exclusively from the Westham quarry. (Record, 102, 154, 165.)

IV.

If, however, the theory of the complainant be regarded as correct, those who were, as co-partners of defendant, interested with him in executing the contract, ought certainly to be made parties to this proceeding.

By the terms of the agreement of 1st January, 1872, the rights of complainant are in subordination to the rights of the creditors of the firm of Andrews, Ordway & Green, and can only be ascertained when a distribution of profits is made among the members of the co-partnership. Can a decree then be obtained enjoining the payment of money to the firm in a case in which the members of the firm are not parties?

Shields *vs.* Barrow, 17 H., 141.
Hinde *vs.* Marlow, 12 Wheaton, 193.

V.

"All transfers and assignments of a claim, or any part or interest therein, and all orders, powers of attorney or other authority for receiving payment of the claim, are absolutely null and void," under the Statutes of the United States.

Spofford *vs.* Kirk, 97 U. S., 484.

If, therefore, the complainant's construction of the agreement of January 1, 1872, be correct, that agreement is null and void.

If, on the contrary, that agreement was an assignment of the profits arising from the contract after they had been ascertained and divided, there could be no injunction restaining the defendant from receiving the gross proceeds of such contract, and using them in the execution of the work he had thereby covenanted to do.

Funds in the hands of a Government officer, payable in the course of an execution of a contract, are not liable to attachment by a creditor of the contracting party, and it would seem that the same rule of public policy which forbids the attachment would also forbid the injunction, would also forbid the attachment, whether such contractor had given a lien upon such funds or not.

~~The State *vs.* Jones~~, 8 Md., ~~88.~~ 96

Mayor v. Root 45 Ill. 133.
Merwin v. Chicago

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